United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1208

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P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-1208

UNITED STATES OF AMERICA,

Appellee,

-against-

VINCENT PAPA,

Appellant.

On Appeal from the United States District Court
For the Southern District of New York

APPELLANT'S REPLY BRIEF

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VINCENT PAPA,

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REPLY BRIEF FOR APPELLANT

POINT ONE

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT REQUIRES REVERSAL OF PAPA'S CONVICTION FOR CONSPIRACY AND THE DISMISSAL OF COUNT ONE OF THIS INDICTMENT (REPLYING TO POINT ONE OF THE GOVERNMENT'S BRIEF)

From the undisputed facts, as presented to this Court in the briefs of both sides, it is clear that the so-called "Eastern District conspiracy" and the conspiracy charged below (the "Southern District conspiracy") were, in fact and in law, but parts of a single unified scheme to merchandise narcotics. Accordingly, Papa's 1972 conviction

in the Eastern District of New York should have barred his trial and conviction below. The essential facts have been detailed and analyzed in the briefs for the appellant and for the government.

In its brief, the government concedes at least that "both" conspiracies operated simultaneously for four years, that both were organized and operated within the City of New York, that both were organized and operated for the same purpose, and that both were supplied by a single common source, Vincent Papa.

The government nevertheless argues, relying on the record in this case and the Eastern District grand jury minutes, that these were self-sufficient, free-standing organizations. (Government's Brief at 30) But this Court, on analogous facts, has consistently rejected the same sort of argument when urged by appellants making multiple conspiracy claims. For although it may have been true here that each of the respective Southern and Eastern District wholesalers who purchased from Papa did not know the identities of every other wholesaler, each did know that Papa was a supplier of immense quantities of narcotics, and each knew that he was not the only purchaser from Papa. Indeed, each benefited from the fact that Papa was a large volume distributor, and thus each had a stake in Papa's continued viability in this role. The continuous flow in opposite directions of cash and narcotics to and from a large

number of wholesalers enabled Papa to be continuously able to meet the needs of each. Thus, all made themselves part of an enterprise which they knew was larger and more inclusive than Papa's separate transactions with each of them. Under similar circumstances, neither this Court nor the Supreme Court has hesitated to find a single conspiracy. Blumenthal v. United States, 332 U.S. 539, 553 n.14 (1947); United States v. Bynum, 485 F.2d 490,497 (2d Cir. 1973); United States v. Bruno, 105 F.2d 921 (2d Cir. 1939); United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), United States v. Arroyo, 494 F.2d 1316 (2d Cir. 1974), United States v. Sisca, 503 F.2d 1337 (2d Cir. 1974), United States v. Mallah, 503 F.2d 971, 985 (2d Cir. 1974).

Thus it is clear that if Vincent Papa, Anthony Possero, and Victor Euphemia, for example, had all been indicted in a single count for conspiracy, and if the government's case consisted of the Eastern District grand jury minutes and the witnesses ruled upon by the government below, none of the defendants could have successfully pressed a multiple conspiracy claim. See Rex v. Meyrich and Ribuffi, 21 Crim. App. R.94 (Canada 1929),relied upon by the government in a recent and succeesful effort to rebut a defendants' multiple conspiracy claim in United States v. Ong, et al, 74 Cr. 1127 (S.D.N.Y. 1974).

Certainly, such a claim would not have availed Papa. For the scope of any conspiracy must be determined

from each party's understanding of the reach of his own agreement, as United States v. Borelli, 336 F.2d 376,384 (2d Cir. 1964), makes very clear:

> [T]he gist of the offense...[is]... the agreement, and it is essential to determine what kind of agreement existed as to each defendant. (emphasis added)

Adopting the view that whether there existed one or a number of conspiracies depended upon the understanding of the individual defendant raising the issue, the Court in Borelli ultimately found a single conspiracy as to certain "core" conspirators, and multiple conspiracies as to others. Application of these considerations to the facts of the present case reveals that, quoad Papa at least, there existed, between 1967 and 1972 but a single continuous narcotics merchandising scheme, involving the defendants named in the Eastern and Southern District indictments. For there is nothing in the record which even remotely suggests that Papa sought to isolate or separate the activities of either group of second-echelon distributors. He dealt with both groups on the same terms, in the same capacity, in a single geographical area, supplying roughly equivalent quantities of narcotics, simultaneously for four years, (1967-1971) and comingled the profits derived from both in the money laudering end of the operation.*

In this connection, the government argues that Papa

*The Southern District record established that Papa "washed" millions of dollars through a White Plains bank in partnership with Anthony Possero, a co-conspirator and reputedly Papa's partner in the Eastern District case. The significance of Possero's involvement in the present case is discussed infra.

"withdrew" from the Eastern District end of the operation at the close of 1971, and that this demonstrates a clear distinction between these putatively different enterprises. (Government's brief at 30) Beyond the fact that this ignores the simultaneous operation of the Eastern and Southern District networks for four years, it belies a gross misapprehension of the state of the law. With respect to core conspirators, neither changes in personnel nor modifications of the common enterprise through enlargements or contractions of the business have ever been held to convert a single conspiracy into several smaller ones. See e.g. United States v. Borelli, supra.

Thus, as to Papa, at the very least, the facts as conceded by the government establish but a single conspiracy for participation in which Papa could only be indicted, tried, and convicted once.

All of the above, of course, is bottomed on the premise that the government is correct in its claim that "at no point do the levels of personnel [in the Eastern and Southern District cases] cross." The record on its face, however, belies this assertion. In fact, at least four high-level, core conspirators involved in this case and/or in United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975), were also co-defendants in the Eastern District prosecution.*

*The government emphasizes the claim that the minimal overlap in personnel shows that the conspiracies are different. It should be pointed out, however, that most of the co conspirators named in the Bill of Particulars were lower-echelon personnel.

A. ANTHONY POSSERO

Named as an unindicted co-conspirator in the present case, Anthony Possero's involvement was limited, according to the government, to a "cameo" role as a peripheral participant in Vincent Papa's money laundering operation. (Government's brief at 31-32 n.)

The government neglects to point out, however, that among the primary functions of a bill of particulars is to protect the defendant from multiple prosecution for the same offense. Recognizing here that the naming of Possero in the bill of particulars in the instant case "raises certain [double jeopardy] problems," the government seeks to conceal the significance of Possero's involvement in this case, dismissing it as a "cameo appearance" in which Possero did nothing more than employ the money-changing services of Norman Young "once or twice." But such was not the case.

Money--huge sums of it--is,as this Court is well aware, the "lubricant of the narcotics trade," United States v. Bynum, 360 F.Supp 400, 418 (S.D.N.Y. 1973), and thus the laundering of nearly two million dollars through a Westchester bank in less than two years in the present case is properly to be regarded as a vital component of the present conspiracy. The record is clear that far from putting in a "cameo appearance," Anthony Possero had one of the starring roles in this venture: He was a client of Norman Young's, having been introduced to Young by Vincent Papa. (Trial transcript "Tr," at 943. He met with Young on from ten to twenty occasions.

(Tr. 943.) He personally appeared in Young's office on several occasions with paper bags stuffed with cash in small denominations, which Young agreed to exchange for fresh currency in large bills. (Tr. 944) a service he performed exclusively for Vincent Papa and Anthony Possero. (Tr. 941). Most importantly of all, the record unequivocally establishes that Possero occupied an exalted position of trust viz-a-viz Papa. For Possero, the record shows, was Vincent Papa's "bag man," a Papa "designee," who obtained from Young on a number of occasions, and on Papa's instructions, hundreds of thousands of dollars of Vincent Papa's freshly laundered money. This was hardly a "cameo" role.

But it is through a comparison of the Eastern and Southern District cases considered together that the truly symbiotic nature of their relationship is revealed. The Eastern District grand jury testimony of Angelo Paradiso established that during 1970 and 1971--at or about the very time that Papa and Possero were 'washing" millions in White Plains--both were supplying multi-kilogram quantities of narcotics to Anthony Loria for distribution through the Eastern District network. It is clear that the Westchester money-changing scheme--which, according to the government, greased the wheels of the Southern District distribution machinery--was a vital part of and essential to the success of its Eastern District counterpart. Both operations were inextricably linked together at the core by Anthony Possero and Vincent Papa.

B. The Tramunti Connection: Joseph DiNapoli and Anthony Loria

In his original brief to this Court, Papa argued that this case and United States v. Tramunti, supra, were but parts or pieces of a single whole, and thus, that the overlap of time, place, and core personnel between either case and the Eastern District prosecution of Vincent Papa establishes a unity among all three. In response, the government eschews any position directly on the question of identity between this case and Tramunti: it argues instead that

> there was no evidence other than DiNapoli's co-possession with Papa of the million dollars to link him to this conspiracy. Indeed, the record establishes that DiNapoli was not a member of this conspiracy.

Government's Brief, supra at 32 n.

But DiNapoli was listed as a co-conspirator in the instant case in the government's bill of particulars and not until the filing of its brief on appeal did the government claim the contrary. In view of the existence of other evidence in the present case directly establishing Papa's involvement in multi-kilogram narcotics transactions, of the association between Papa and DiNapoli under circumstances evidencing guilty knowledge on the part of both, (see the record on the motion to suppress below) and of the inference which inevitably arises in connection with the possession of an enormous amount of cash, under such circumstances, see United States v. Tramunti, supra, at 1105, it ill behooves the government to claim that DiNapoli

was included in the bill of particulars through "an abundance of caution."*

Thus it is impossible to separate any of these cases from any of the others. Significant persons, transactions and activities which were at the heart of each prosecution turn out, upon analysis, to have spilled over into and to have been embraced within one or both of the others during congruent periods of time. Thus, a two million dollar money laundering scheme which the government alleged as part and parcel of the present case is also related, through the participation of Anthony Possero to the Eastern District prosecution; the same million dollar pelf seized in the Bronx in 1972, which the government here sought to link to Papa and the money laundering scheme was also claimed to have been the proceeds of Joseph DiNapoli's heroin distribution network in Tramunti; and most importantly of all, four highly placed, core conspirators appear occupying identical positions in the criminal hierarchy during identical periods of time; Vincent Papa, Anthony Possero, Joseph DiNapoli and Anthony Loria. (Papa, Possero, Loria (Eastern District case); Papa, Possero, DiNapoli (Southern District case)); Papa, DiNapoli, Loria (United States v. Tramunti)).

*The relationship among the Eastern and Southern District cases and Tramunti, particularly with respect to Anthony Loria, is discussed in appellant's brief at pp 59, 57n.

Accordingly, Papa's conviction should be reversed.*

*The government suggests that reversal here would "call into question the vitality of this Court's pronouncements in United States v. Sperling, 506 F.2d 1323, 1340-1341 (2d Cir. 1974) and United States v. Miley, 513 F.2d 1191 (2d Cir. 1975)." Precisely the opposite is the case. In Sperling, this Court found a single conspiracy in spite of the fact that "the ties among the members of each group were much stronger than the ties between the two organizations;" it recommended, however, that for the government to have tried the members of each organizations separately would have been wiser. This surely was not a recommendation that the same individual should have been tried twice. In Miley, the Court found separate conspiracies but only because the size of the operation was such as to defeat the ordinary inference, which arises in large scale cases, that persons operating on any given level are aware that the operation employs the efforts of others whose activities parallel their own. Indeed, for multi-million dollar narcotics businesses, the Court expressly reaffirmed the doctrine applied in the Agueci-Bynum-Arroyo-Sisca line of cases to the effect that, "An individual associating himself with a 'chain' conspiracy knows that it has a 'scope' and that for its success it requires an organization wider than may be disclosed by his personal participation." (emphasis added).

POINT TWO

PAPA'S PLEA OF GUILTY IN THE EASTERN DISTRICT OF NEW YORK EXPOSED HIM TO JEOPARDY ON A CHARGE OF ENGAGING IN A CONTINUING CRIMINAL ENTERPRISE. THAT PRIOR JEOPARDY SHOULD HAVE BARRED THIS PROSECUTION (REPLYING TO GOVERNMENT'S BRIEF, POINT III)

The government argues, that "even had Papa been tried on the §848 count and acquitted or convicted of the offense, double jeopardy would not have barred a subsequent prosecution for a conspiracy and substantive violation of the narcotics laws," citing United States v. Sperling, 506 F.2d 1323, 1343 (2d Cir. 1974, United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir. 1974), United States v. Manfredi, 488 F.2d 588,602 (2d Cir. 1973), as well as United States v. Ortega-Alvarez, 506 F.2d 455, 457 (2d Cir. 1974) and United States v. Nathan, 476 F.2d 456, 458-59 (2d Cir. 1973). None of these cases is even arguably relevant, for all of them deal with issues which the appellant Papa neither raises nor contests.

Thus, in Manfredi, Sisca, and Sperling, the Court upheld §848 as against various constitutional challenges founded upon the claim that the statute was void for vagueness, or unconstitutional as applied in specific cases. Vincent Papa does not raise these issues here. And although, in fact, appellants in these cases were tried, convicted and sentenced both for conspiracy and for a violation of §848, in a single

proceeding, the sentences imposed under §848 were concurrent with the remainder, and thus none of the appellants raised any challenge to that aspect of the case. Thus, this Court, in Manfredi, Sisca and Sperling neither considered nor disposed of the contentions raised here. Moreover, Ortega-Alverez and Nathan did not involve double jeopardy claims arising under §848: Ortega-Alverez held that a prior conviction for a substantive violation of the narcotics laws (selling narcotics not in their original stamped package) does not bar a later prosecution for conspiracy, hardly a novel proposition (see United States v. Kramer, 289 F.2d 909 (2d Cir. 1961), and one which appellant does not dispute; Nathan held that a conviction for conspiracy to violate one statute is not a jeopardy viz-a-viz a conspiracy to violate another, a proposition not at stake here, and one which must, in any event, be regarded as questionable in light of this Court's disposition of United States v. Mallah, supra. (See also, Short v. United States, 91 F.2d 614 (4th Cir. 1937), cited with approval in United States v. Mallah, supra; United States v. Cioffi, 487 F.2d (2d Cir. 1973) 492, 497 n.6

At issue here, rather, is a wholly different claim. 21 U.S.C. §848 is an unusual offense in that it includes among its elements the commission of still other offenses. Thus, quite apart from the question of whether a single indictment may charge conspiracy, substantive offenses, and a violation of §848, it is clear that just as a conviction, for example, for

armed bank robbery, 18 U.S.C. §2113(d) precludes prosecution separately for the predicate included felony of bank robbery, 18 U.S.C. 2113(d) so a conviction had under §848 precludes prosecution for its predicate offenses.

There is nothing novel about this doctrine. As the Supreme Court held in Blockburger v. United States, 284 U.S. 299, 304 (1932), when two separate statutory violations are alleged to be for "the same offense,"

> the test to be applied to determine whether there are two offenses or only one is whether each separate statutory violation...requires proof of a fact which the other does not.

It follows from this that conviction for an offense which includes all of the elements of some other offense precludes prosecution for the latter.

Thus, because proof of a violation of §848 requires proof of each and every element of the violations of the narcotics laws which form the predicate for the charge, a conviction under §848 constitutes a jeopardy as to its underlying offenses.* Accordingly, the issue here is whether the Eastern District charge of continuing criminal enterprise included among its elements the conspiracy and substantive count charged and proved against Papa below.

Counsel for the government in the Eastern District

*An acquittal under §848 might raise certain problems in applying the collateral estoppel rule adopted in Ashe v. Swenson, 397 U.S. 436 (1970), to the predicate offenses. However, Papa's plea in the Eastern District, offered and accepted in satisfaction of the entire indictment, must be regarded as a conviction for double jeopardy purposes.

prosecution of Papa, James Druker, has acknowledged that if the Eastern District case had proceeded to trial, he did anticipate tendering the testimony of Joseph Ragusa and evidence of the seizure of one million dollars from Vincent Papa in February, 1972, as proof of the government's case on the charge of continuing criminal enterprise. Thus, the government would very likely have sought to prove through Ragusa, the conspiracy charged below and Papa's possession of 160 pounds of heroin hydroshloride as among the predicate offenses of the 848 count of the indictment. Such a state of affairs would have barred the separate prosecution for these offenses below by reason of the double jeopardy clause, since proof of the 848 count would have required proof of each and every element of the conspiracy and substantive count charges and proved below.

The government dismisses Druker's acknowledgements regarding Ragusa and the one million dollars as speculation about "cosmic possibilities." Government's brief at 61. But this misses the point. Absent a trial record or a bill of particulars, Druker's admissions with respect to the proof he expected to have offered in support of count five of the Eastern District case must stand in place of these usual indicia of the scope of the government's case. Because Druker's averments more than substantiate Papa's double jeopardy claim with respect to the Eastern District charge of continuing criminal enterprise, the burden has shifted to the government to prove

that the conspiracy and substantive offenses lodged against Papa below were not the predicate of the Eastern District 848 charge. United States v. Mallah, supra at 986.

The government has failed to meet, much less sustain, its burden in this respect, choosing instead to ignore it. Accordingly, Papa's conviction should be reversed and the indictment dismissed.

POINT THREE

DUE PROCESS REQUIRES REVERSAL BECAUSE PRESENT PROSECUTION WAS BROUGHT IN DEROGATION OF A PRE-PLEADING AGREEMENT. (REPLYING TO GOVERNMENT'S BRIEF, POINT II)

The government contends that the 1972 Eastern District plea bargain was expressly limited to the Eastern District of New York; that the District Court so found, and that its findings were not "clearly erroneous" and thus should not be distrubed, relying upon United States v. Podell, ___F2d___(2d Cir. June 24, 1975), slip op. at 4365) and F.R.Civ.P. Rule 52(a).

The record, however, does not support the government's position in this respect, and, in any event, its reliance upon Podell and Rule 52(a) is misplaced. For this is not a case, like Podell, where District Court proceedings revealed a dispute about what the facts were, and hence required the court to make findings of fact in connection with determinations of credibility. This, rather, is a case in which neither the basic facts nor credibility were challenged below. It is a case, in short, where, to paraphrase this Court's holding in Orvis v. Higgins, 180 F.2d 537,539 (2d Cir. 1950), "the evidence is...oral and...deals with undisputed facts...[under these circumstances, the Court] may ignore the trial judge's finding

and substitute [its] own." See also Tieri v. Immigration and Naturalization Service, 457 F.2d 391 (2d Cir. 1972), Aetna Casualty and Surety Co. v. Hunt, 486 F.2d 81 (10th Cir. 1973), Dollar v. Land, 184 F.2d 245 (D.C. Cir. 1950).

With respect to the merits of the government's claim that the agreement was limited to the Eastern District, issue has been joined in appellant's brief. It bears repeating here, however, that the discussions of August 18, 1972, between James Druker and counsel for Papa began with an expression of concern on the part of counsel for Papa that his client not be exposed to the hazards of subsequent re-prosecution after his incarceration; thus it is clear that the ensuing discussion related to what Papa might be prosecuted for, not who would prosecute him. The discussions which followed culminated in an agreement that Papa would not be prosecuted on the basis of any information then in the hands of the U.S. Attorney's Office for the Eastern District of New York. The precise fears expressed by counsel for Papa--that his client might be subject to prosecution following his imprisonment based upon matters actively under investigation* in the Eastern District at the time the agreement was reached--were realized in the present

*The government professes to be unclear about what constitutes a "case" or "investigation." Government's brief at 50n. As the Court below noted, however, "[w]hen you take a witness, an informant and interview him and make an affidavit telling what he knows, have a file and put it before the grand jury, [as had been done with regard to Ragusa in July, 1972,] originally I would call it an investigation." Indeed, if that does not constitute an "investigation," it is hard to imagine what would. Moreover, this "seed" as the government calls it turns out to have been in fact the fully grown body of the government's case against Papa below.

prosecution. The very same witness, Joseph Ragusa testifying to the very same matters he had disclosed to Eastern District investigators in July, 1972, was the focal point of the present case. It is difficult to imagine a more clear breach of a prosecutorial promise.

The government next argues that the agreement did not include matters disclosed by Joseph Ragusa and that, in any event, Druker's promises that Papa would not be prosecuted further for any part "or piece" of the Eastern District conspiracy, or for overt acts embraced within it* or in connection with any matter then under investigation in the Eastern District were not part of the consideration exchanged for Papa's plea.** These claims are frivilous, and are more than adequately rebutted by the record below (See appellant's Appendix, See also Appellant's brief, pp 14-18.)

*It should be noted that if Papa's double jeopardy claim (See point I and II supra) is well founded, this aspect of the plea bargain requires reversal and dismissal of the indictment in its entirety.

** This issue of "reliance" is treated at greater length in Point IV, infra.

POINT FOUR

THE GOVERNMENT'S BREACH OF THE "ATLANTA AGREEMENT" REQUIRES REVERSAL (REPLYING TO GOVERNMENT'S BRIEF, POINT IV)

The government argues that Papa neither relied upon James Druker's promise to "drop" the Ragusa matter nor was he prejudiced by the government's breach of that promise. These twin claims rest upon an erroneous reading of both the record below and the applicable case law, primarily, Santobello v. New York, 404 U.S. 287 (1971)

The record below clearly establishes that Papa disclosed information Druker deemed vital* in exchange for promises of confidentiality and that he would not be prosecuted as the result of matters made known to the government by Joseph Ragusa. Thus, as is often the case, the consideration provided by the promisor consisted of more than one promise, one of which was regarded by the promiser as more important than the other. That Papa, quite understandably, regarded the lives and safety of himself and his family as of paramount importance, hardly reduces Druker's promise to "drop" the Ragusa matter to a purely gratuitious question. Indeed, Druker's understanding of his own agreement, at the time it was made, demonstrates conclusively that the promise to drop

*The government urges here, as it did below, that what the District Court referred to as "The Fact" was of nominal value. It is sufficient to note that at the time of the agreement, "The Fact" was regarded as a matter of profound urgency and importance; as significant, as the District Court noted, as the "disclosure of the presidential tapes." (Appellant's sealed appendix at B38 n.9, B61.

the Ragusa matter was a significant part of the bargain. (See Appellant's Sealed Brief, pp 5-6)

The facts of Santobello reveal similarly bifurcated promises. There, moreover, it was clear that the promise to permit the defendant to enter a plea of guilty to a misdemeanor was the most important aspect of the agreement: it limited the defendant, a notorious gambling figure, to an exposure to a maximum of one year's incarceration. On the other hand, the promise by the prosecutor not to make a specific recommendation as to sentence had no readily identifiable or predictable consequences; of the two, it surely was regarded as the less important. Yet, the Supreme Court found that its breach required reversal because:

> when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled.*

Santobello V. New York, supra, at 262 (emphasis added)

Santobello also fully rebuts the government's assertion that Papa was not "prejudiced" by any breach of the Atlanta agreement. For it is hard to see how Santobello was prejudiced at all by the prosecutor's breach of the plea bargain. The sentencing court there stated on the record that it ignored the prosecutor's sentencing recommendation.

*Santobello, as well as this case, are to be contrasted with United States v. Podell, supra. There, after a hotly contested hearing, the district court found that the defendant's plea was entered "exclusively" in reliance on the government's promise to give the defendant a "fighting chance" to keep his license to practice law. This court sustained the district court's findings as "not clearly erroneous," a standard plainly not applicable here. See pp 16-17, supra

and the Supreme Court credited this finding. 404 U.S. at 462. Rather the breach of a material part of an agreement duly entered and behind which stood the honor, integrity and good faith of government, was there, as it should be here, sufficient of and by itself.

Lastly, the government urges policy considerations which it deems require affirmance of the judgment below. These considerations, however, go no further than explaining why internal regulations of the administrative control of activity within the Department of Justice are necessary and appropriate. But the failure in this case, if any, by anyone within the Department of Justice to abide by any applicable rule or to or to communicate with the appropriate parties, cannot and should not justify the visitation of a twenty year prison sentence upon a defendant in derogation of two agreements he has fully honored.

Accordingly, and for all the foregoing reasons, the judgement should be reversed and the indictment dismissed.

Respectfully submitted,

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